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IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 75-651

TEAMSTERS LOCAL UNION 657,
Petitioner,
v.
JESSE RODRIGUEZ ET AL.,
Respondents.

No. 75-715

SOUTHERN CONFERENCE OF TEAMSTERS,
Petitioner,
v.
JESSE RODRIGUEZ ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE

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MOTION OF THE NATIONAL RAILWAY LABOR CONFERENCE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Railway Labor Conference (NRLC) hereby moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief as *amicus curiae* on the merits of the above-captioned cases. Respondents have consented to the filing of this brief,[1] but petitioners have withheld their consent. Accordingly, NRLC seeks leave of the Court to file its brief.

The NRLC represents almost all of the nation's Class I railroads in national collective bargaining with unions representing employees of those railroads pursuant to the Railway Labor Act, 45 U.S.C. § 151 *et seq.* Under that Act, employees are unionized according to crafts and classes. Even though a given union may represent more than one craft or class of employees, there are generally fifteen or sixteen unions representing the crafts or classes of employees engaged by any single railroad. Over the years, each union in the railroad industry has bargained for and obtained an elaborate seniority system for its members, and each union has jealously guarded the jobs and work of its craft against efforts by the carriers to consolidate the work performed by separate crafts.

For the past several years, the NRLC and the unions have been engaged in industry-wide collective bargaining that is bringing important changes in the seniority systems now in force. Agreements have already been entered into with about one-third of the railroad unions, covering some 45 percent of the industry's employees. In general, the agreements provide opportunities for minority and female employees in designated job classifications to transfer to certain other classifications with "carry-over seniority." That is, the agreements permit the covered employees to use their "company seniority dates," as defined in the agreements, in bidding for vacancies in the new crafts and, after successful transfer,

[1] The consent letters from counsel for respondents are on file with the clerk.

for all purposes for which seniority is relevant under collective bargaining agreements, such as bidding on future vacancies, recall, work shifts, vacations, fringe benefits, and the like. The agreements also give transferring employees "carry-back seniority," pursuant to which the employees are permitted to retain seniority in their old craft for a minimum of 90 days from the date of transfer or from the date of expiration of any probationary or training period in the new craft, whichever is longer. Transfers with carry-over seniority are permitted on a "one-time-only" basis and only to classifications within the jurisdictions of unions that have signed the agreements.

The NRLC believes that these agreements fulfill the requirements of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. (1970 ed. & Supp. V) § 2000e *et seq.*, and satisfy the reasonable goals of the Equal Employment Opportunity Commission and the Office of Federal Contracts Compliance to minimize restraints upon the intercraft or interclass transfers of minority and female workers in the industry. See generally *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); *United States* v. *St. Louis-San Francisco Railway Co.*, 464 F.2d 301 (8th Cir. 1972), *cert. denied*, 409 U.S. 1116 (1973) *and sub nom. United Transportation Union* v. *United States*, 409 U.S. 1107 (1973); *United States* v. *Chesapeake & Ohio Railway Co.*, 471 F.2d 582 (4th Cir. 1972), *cert. denied sub nom. Local 268, Brotherhood of Railroad Trainmen* v. *United States*, 411 U.S. 939 (1973).

While substantial results have been achieved through voluntary modification of seniority rules by agreement with several unions, the NRLC is concerned about the progress of negotiations with the remaining railroad un-

ions. In the absence of union pressure, the carriers would willingly alter the seniority systems. There is nothing to be gained by a carrier from perpetuation of a seniority system that is arguably discriminatory. It is the unions and the employees protected by existing seniority systems who have a special interest in those systems and who, if a system is found discriminatory, would want to modify the system only to the minimum extent necessary to cure the particular defect.

While the carriers do not have an interest in perpetuating a seniority system that is arguably discriminatory, they have a significant interest in having the unions join with them in altering seniority systems. By unilaterally modifying a seniority system that has been memorialized in collective bargaining agreements, the carriers risk strikes and slowdowns, protracted litigation, and jeopardized relationships with the unions and employees.

For all of these reasons, the NRLC wishes to emphasize to the Court the importance of the general principle that unions as well as employers should be held liable under Title VII for violations embodied in collective bargaining agreements. Without the incentive of avoiding liability under Title VII, and thus avoiding the possibility of back pay awards under Section 706(g) of the Act, unions would have little or no incentive to modify provisions that they have long insisted upon. The briefs of petitioner labor organizations suggest that unions should stand in a different position from employers *vis-à-vis* liability under Title VII, when seniority systems in collective bargaining agreements have been found unlawfully to perpetuate the effects of prior discrimination in hiring. *Amicus* seeks leave to file this brief to respond to this position, which may be given little

attention in the briefs of respondents in view of the many other issues in the case.[2]

Wherefore, the National Railway Labor Conference requests that this Court grant leave to file the accompanying brief as *amicus curiae*.

Respectfully submitted,

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October 13, 1976

[2] This brief is being filed on October 13, 1976, the date that the brief for respondents Rodriguez *et al.* is due (letter from Clerk to Vilma S. Martinez, Esq., September 3, 1976).

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INTEREST OF AMICUS

The interest of the *amicus curiae* is set forth in the attached Motion for Leave to File Brief as Amicus Curiae.

QUESTION PRESENTED

Whether labor organizations are properly liable under Title VII of the Civil Rights Act of 1964, as amended, when they have negotiated or are parties to a collective bargaining agreement, the seniority provisions of which are found to "lock in" the effects of prior discriminatory hiring by the employer.[1]

STATEMENT OF THE CASE

These petitions bring before the Court three related employment discrimination actions, all initiated in the United States District Court for the Western District of Texas, dismissed on the merits after trial on the liability issues, and reversed and remanded for further proceedings by the United States Court of Appeals for the Fifth Circuit. The facts of the cases are discussed in detail in the briefs of the parties and the decisions of the court of appeals; we shall merely summarize here the facts of the principal case, *Rodriguez* v. *East Texas Motor Freight System, Inc.* (ETMF).[2]

Three Mexican-American individuals working as city truck drivers for ETMF in San Antonio, Texas, sued under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. (1970 ed. & Supp. V) § 2000e *et seq.*, and under R.S. § 1977, 42 U.S.C. § 1981, on behalf of themselves and similarly-situated Mexican-American and black individuals, alleging various discriminatory employment practices on the parts of defendants ETMF, Teamsters Local Union 657 (petitioner in No. 75-651), and the

[1] *Amicus* believes that this question is "fairly comprised" in the questions stated by the petitioners. Supreme Court Rule 23(1)(c).

[2] 505 F.2d 40 (5th Cir. 1974). The other two cases are *Herrera* v. *Yellow Freight System, Inc.*, 505 F.2d 66 (5th Cir. 1974), and *Resendis* v. *Lee Way Motor Freight, Inc.*, 505 F.2d 69 (5th Cir. 1974).

Southern Conference of Teamsters (petitioner in No. 75-715).[3]

Prior to 1970, ETMF had never employed a black or Mexican-American as a road driver in the area of Texas covered by the Southern Conference. (A. 73-74.) Approximately 35 percent of ETMF's city drivers in Texas are black or Mexican-American. (A. 74.) The brunt of plaintiffs' case below against ETMF was that Mexican-American and black city drivers were discriminatorily locked into the city driver jobs and prevented or discouraged from transferring to the more desirable road driver jobs by the "no transfer" policy in effect at ETMF. That policy was explained by the court of appeals as follows:

> "Since 1954 ETMF has followed a 'no-transfer' policy, prohibiting the transfer of drivers between city and road driver classifications and between terminals. [Footnote omitted.] Under the policy, in order for a city driver to obtain a position as a road driver, he must resign his city driver job and apply for a road driver slot. He thereby forfeits all accumulated seniority. * * * For the purposes of strengthening his application, he gains no 'credit' for his years as a city driver. And if his bid to be a line driver fails, there is no guarantee that he will be rehired as a city driver." A. 72.

The court of appeals went on to relate the company's no-transfer policy to the seniority provisions in the existing collective bargaining agreements, which were the crux of plaintiffs' case against the unions (A. 99). Teamsters Local 657, of which plaintiffs in the underlying action were members, represents city drivers employed by

[3] The employer, ETMF, is the petitioner in No. 75-718; this Court has granted that petition and consolidated that case for argument with Nos. 75-651 and 75-715, the cases brought to this Court by the labor organizations (order dated May 24, 1976). This *amicus*, however, is addressing an issue presented only by the labor organization petitions.

ETMF and other employers in certain Texas counties (A. 423); it represents no road drivers.[4] The court said:

> "ETMF's policy against transfers is complemented by the fact that under collective bargaining contracts between ETMF and Local unions, including the defendant Local 657, city drivers who transfer to the road do not carry over their 'competitive-status' seniority, that is, seniority for job bidding and lay off purposes. [Footnote omitted]. Under separate collective bargaining agreements for road and city drivers, competitive-status seniority runs from the time an employee enters a particular collective bargaining unit. Transfer is not expressly prohibited, but it is not expressly permitted either, and the agreements have been universally interpreted to prohibit the carryover of seniority from one classification to another." A. 72-73.

ETMF's no-transfer policy was modified for thirty days in January and February of 1972 to permit city-drivers at terminals which also employed road drivers to transfer to road driver jobs if they could meet certain requirements. Even under the modification, however, any city driver transferring to the road still lost his seniority for job bidding and lay off purposes. (A. 73.)

After trial on the liability issues, the district court denied plaintiffs all relief and dismissed the complaint on the merits. (A. 55-67.) Although it found that the individual plaintiffs were not qualified to hold road driver jobs in any event (A. 23), it found the company's no-transfer policy and the separate seniority rosters to be

[4] The Southern Conference of Teamsters is the bargaining agent of local unions—both city and road locals—in a ten-State area that includes Texas. It negotiated the separate agreements for city and road drivers that contain the seniority provisions at issue in this case. The details of the negotiating arrangements between the local unions, the Southern Conference, and the International Brotherhood of Teamsters, are explored in the court of appeals opinion (A. 98-99) and in the briefs of the parties.

reasonable and proper and accordingly found that defendants "did not discriminate against the plaintiffs or any other employee or Union member on the basis of race or otherwise." (A. 65.) It further concluded that the action was not a proper class action. (A. 66.)[5]

The court of appeals reversed the judgment of the district court and remanded for further proceedings. A. 68-111; 505 F.2d 40 (5th Cir. 1974). It found the dismissal of the class action claims erroneous, ordering that on remand the class considered for relief should be defined as all of ETMF's Mexican-American and black city drivers included under the collective bargaining agreement entered into between ETMF and the Southern Conference of Teamsters covering the State of Texas. (A. 83.)

Turning to the liability issues, the court found that plaintiffs, by their statistical evidence on the absence of minority road drivers, had established a prima facie case of discrimination in hiring, and that ETMF had failed to rebut that case. (A. 90.) It went on:

> "The conclusion is inescapable that both the no-transfer policy and the maintenance of dual seniority rosters, one for city drivers and one for line drivers, have perpetuated ETMF's past discriminatory hiring practices. Together, they have removed all realistic opportunity for transfer." A. 90.

The court rejected ETMF's efforts to justify the no-transfer policy in terms of business necessity. (A. 92-93.) It further rejected ETMF's defense of the dual seniority system—as preferred by minority city drivers (A. 93) or as not amenable to unilateral change by ETMF. (A. 93-94.) Finally, it rejected ETMF's argument that plaintiffs had failed to show that any of the plaintiff class met ETMF's road driver qualifications. (A. 94-97.)

[5] We have not tried to present or summarize the stipulations entered into before and during trial. Their significance—as to the precise issues to be decided—is the subject of dispute among the parties, and we do not enter that dispute.

Turning to the union defendants, petitioners here, the court held that "[f]or their role in continuing the effect" of the discrimination against minority city drivers "that closed out the possibility of their being hired originally as road drivers," "the union defendants must share the blame and the liability." (A. 99.) It rejected the justification that petitioners were "merely following the desires of the majority of their black and Mexican-American members" (A. 100), and announced that the availability of the reasonable alternative of a one-time-only transfer with seniority carryover vitiated the unions' business necessity defense. (A. 101.)

The court remanded the case for consideration of the question of remedy, directing that minority city drivers with three years' experience at city driving must be permitted to transfer to road vacancies, unless they failed to meet other nondiscriminatory qualifications essential for safety or efficiency. (A. 103.) Those city drivers who transfered were to carry with them seniority from the date that they acquired the experience necessary to qualify them for road driivng. (A. 105-07.) No view was intimated as to the apportionment of back pay awards among the three defendants. (A. 107-08.)

ARGUMENT

Labor Organizations Are Properly Held Liable Under Title VII When They Have Negotiated or Signed a Collective Bargaining Agreement, the Seniority Provisions of Which "Lock in" the Effects of Prior Discriminatory Hiring by the Employer.

I

In the cases before the Court, the seniority provisions in the collective bargaining agreements covering road and city drivers at ETMF were found to "lock in" the effects of prior discriminatory hiring by the employer, by discouraging transfers between city and road driver jobs. Accordingly, the court of appeals held both the employer and the unions to be liable under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. (1970 ed. & Supp. V) § 2000e *et seq.*, and remanded for consideration of remedy. The petitioner labor organizations contend that this holding was erroneous as to the unions for a variety of reasons, many closely tied to the facts and trial proceedings in the particular cases before the Court.

Amicus National Railway Labor Conference (NRLC) does not desire to enter into the disputes over many of the issues briefed by the parties. In particular, we do not discuss here the class action issues,[6] any matter pertaining to liability under R.S. § 1977, 42 U.S.C. § 1981,[7] the arguments that the seniority provisions had no effect of discouraging transfers because of the employer's own flat no-transfer policy,[8] the arguments peculiar to the local's limited jurisdiction over city and not road drivers,[9] and the arguments involving the significance of the desires of a majority of the local union.[10] Nor do we discuss the factual and legal argument that these particular seniority provisions did not lock-in the effects of prior discriminatory hiring because the collective bargaining agreements themselves, properly read and construed, permit and even require the granting of "rightful place" seniority to indi-

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[6] Both labor organizations adopt by reference the arguments on the class action issues in the Brief for Petitioner ETMF in No. 75-718. Brief for Petitioner Teamsters Local 657 at 4 n. 1; Brief for Petitioner Southern Conference at 2 n. 2.

[7] Both Teamsters Local 657 and the Southern Conference included references to 42 U.S.C. § 1981 in the questions presented in their petitions, but do not separately brief the construction and application of Section 1981.

[8] Brief for Petitioner Southern Conference at 18-23.

[9] Brief for Petitioner Teamsters Local 657 at 16-18.

[10] Brief for Petitioner Teamsters Local 657 at 22-23.

vidual employees previously discriminated against.[11] *Amicus* files this brief in support of the ruling below that when an employer is liable under Title VII because of seniority provisions in collective bargaining agreements, then the union that signed or negotiated those agreements must be held liable as well.

II

The court of appeals held the employer liable both for its no-transfer policy and for the separate seniority rosters for road and city drivers in the collective bargaining agreements, on the ground that both the policy and the seniority rules perpetuated the effects of past discrimination in hiring. (A. 84-87.) Thus, the court necessarily found that the dual seniority system constituted an "unlawful employment practice" on the part of the employer under Section 703(a) of the Civil Rights Act of 1964.[12] In so doing, the court of appeals followed a long line of lower court cases that have stated that seniority provi-

[11] Brief for Petitioner Teamsters Local 657 at 22; Brief for Petitioner Southern Conference at 29-30 & 33. See also Brief for Petitioner International Brotherhood of Teamsters in Nos. 75-636, *International Brotherhood of Teamsters* v. *United States*, and 75-672, *T.I.M.E.-D.C.* v. *United States*, (consolidated) at 42-43 (related cases now before the Court). Closely involved is the argument that minority employees never filed grievances with their unions. Brief for Petitioner Teamsters Local 657 at 21; Brief for Petitioner Southern Conference at 33.

[12] Section 703(a), 42 U.S.C. (1970 ed. & Supp. V) § 2000e-2(a), provides:

> "It shall be an unlawful employment practice for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

sions that lock in the effects of past discrimination constitute separate and continuing violations of Title VII.[13]

Having made that determination with respect to the employer, the court of appeals passed with little trouble to the conclusion that the union defendants—which had negotiated or signed the agreements at issue—were liable as well. That is, the court necessarily found that the separate seniority provisions also constituted an "unlawful employment practice" on the part of the unions under Section 703(c) of the Act.[14]

[13] *E.g.*, *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968); *Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); *Bing* v. *Roadway Express, Inc.*, 485 F.2d 441 (5th Cir. 1973); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971); *United States* v. *Chesapeake & Ohio Railway Co.*, 471 F.2d 582 (4th Cir. 1972), *cert. denied sub nom. Local 268, Brotherhood of Railroad Trainmen* v. *United States*, 411 U.S. 939 (1973); *United States* v. *N. L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973); See also *EEOC* v. *Detroit Edison*, 515 F.2d 301 (6th Cir. 1975), *petitions for writs of cert. pending*, Nos. 75-220, -221, -239, -393; *Sagers* v. *Yellow Freight System, Inc.*, 529 F.2d 721 (5th Cir. 1976); *Swint* v. *Pullman-Standard*, 13 FEP Cases 604 (5th Cir. 1976). Unless the allegedly discriminatory exclusion from road jobs was a separate and continuing violation, or resulted from separate and recurring instances of refusal to allow transfer, there would apparently have been no subject-matter jurisdiction under Section 706(d) and -(f), 42 U.S.C. (1970 ed.) §§ 2000e-5(d) & -(f), since the plaintiffs filed their EEOC charges years after the dates of their initial hirings. (A. 8-14.)

[14] Section 703(c), 42 U.S.C. (1970 ed. & Supp. V) § 2000e-2(c), provides:

> "It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer

Petitioner Southern Conference argues at length in its brief that the court of appeals misapplied early lower court cases on the validity of seniority provisions in collective bargaining agreements in holding the unions liable in this case.[15] It cites specifically *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 218 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); and *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968). The Southern Conference distinguishes those cases from the instant case in several different ways:

> (1) That the seniority rules at issue here "have no origin in nor do they represent an intention to discriminate";
>
> (2) That the unions here have never been segregated upon racial or ethnic lines;
>
> (3) That there is no line of progression between city and road jobs, and city jobs are not menial, low-paying, or otherwise necessarily less desirable jobs than road jobs; and
>
> (4) That the collective bargaining provisions themselves, properly read and construed, prohibit racial or ethnic discrimination and provide a means for employees to obtain "rightful place" seniority upon a showing of such discrimination.[16]

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for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

"(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

[15] Brief for Petitioner Southern Conference at 27-36.

[16] See Brief for Petitioner Southern Conference at 29-30.

The Southern Conference argues that these considerations, taken in light of the "bona fide seniority * * * system" provision of Section 703(h) of the Act[17] and this Court's recent decision in *Franks* v. *Bowman Transportation Co.*,[18] absolve the unions from liability.

Whatever the force of this argument by the Southern Conference, it is significant for *amicus's* purposes that it does not offer a justification for absolving the unions under Section 703(c) while leaving the company liable under Section 703(a). Neither the district court nor the court of appeals found that the company, as opposed to the unions, had accepted the continued operation of the separate road and city driver seniority systems with the intention of continuing to injure prior victims of discrimination in hiring. Petitioner's remaining points, we believe, support only the proposition that the seniority provisions cannot be said unlawfully to "lock in" the effects of prior discriminatory hiring. And if that proposition is correct, then the conclusion must be that neither the unions *nor the employer* violated the Act by continuing the operation of the seniority provisions that are challenged.

Petitioner Southern Conference, therefore, attempts to disassociate the unions from the employer primarily on the ground that the seniority provisions in this case

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[17] Section 703(h), 42 U.S.C. § 2000e-2(h), provides:

> "Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, * * *."

[18] No. 74-728, decided March 24, 1976, 47 L.Ed. 2d 444.

had no practical effect on plaintiffs at all, because of the ETMF's no-transfer policy.[19] Petitioner Teamsters Local 657 has an assortment of arguments revolving around its limited jurisdiction and role in negotiating the agreements. We have left these contentions to the parties. For the consideration of petitioners' arguments, however, *amicus* believes that the importance of the general principle that unions share liability with employers for violations embodied in collective bargaining agreements must not be overlooked.

III

The principle that unions as well as employers are liable under Title VII for violations embodied in collective bargaining agreements has commanded widespread acceptance in the lower courts.[20] It found succinct—and often quoted—expression in *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), *petition for cert. dismissed*, 404 U.S. 1006 (1971):

> "The rights assured by Title VII are not rights which can be bargained away—either by a union, by an employer, or by both acting in concert. Title VII requires that both union and employer represent and protect the best interests of minority employees. Despite the fact that a strike over a

[19] Brief for Petitioner Southern Conference at 18-23.

[20] The early cases generally cited are *Quarles* v. *Philip Morris, Inc.*, 279 F.Supp. 505 (E.D. Va. 1968); *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); *Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); and *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971). Some important recent cases are *United States* v. *N. L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Russell* v. *American Tobacco Co.*, 528 F.2d 357 (4th Cir. 1975), *cert. denied*, 48 L.Ed. 2d 176 (Apr. 19, 1976); *Sagers* v. *Yellow Freight System, Inc.*, 529 F.2d 721 (5th Cir. 1976); *Kaplan* v. *International Alliance of Theatrical Employees*, 525 F.2d 1354 (9th Cir. 1975).

> contract provision may impose economic costs, if a discriminatory contract provision is acceded to the bargainee as well as the bargainor will be liable." 444 F.2d at 799 (footnote omitted).

To impose liability upon both parties to an unlawful collective bargaining agreement does no more than hold both liable for the foreseeable effects of their own deliberate actions. In *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1381 (1974), the Court of Appeals for the Fifth Circuit addressed a union's argument that "the mere fact that it was a party to a discriminatory collective bargaining agreement is legally insufficient" to impose liability upon the union.[21] The court observed that the union "must have known precisely what effect the incorporation of the departmental seniority provisions in the collective bargaining agreement would have on [affected] employees." It concluded: "Common sense demands that a union be held to the natural consequences of its labor in negotiating a collective bargaining agreement." *Id.* See also *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50, 70 (1975): "When union and employer are not responsive to their legal obligations [under Title VII], the bargain they have struck must yield *pro tanto* to the law * * *." [22]

[21] In the *Johnson* case the union was appealing an award of backpay, but its argument clearly relates to the underlying liability under Section 703(c).

[22] Lower courts have also indicated that unions may be held liable for "acquiescing" in an unlawful employment practice not embodied in a collective bargaining agreement with that union, or for failing to negotiate for the cessation of such a practice. See, *e.g.*, *Macklin* v. *Spector Freight Systems, Inc.*, 156 U.S. App. D.C. 69, 478 F.2d 979, 989 (1973) ("A union's duty, in representing its members and protecting them from invidious treatment, must certainly be broader than simply refusing to sign overtly discriminatory agreements. * * * [T]acit union acquiescence in an employer's discriminatory practices effectively produces the same end result that was condemned in *Steele* [v. *Louisville & Nashville R. Co.*, 323 U.S. 192 (1944)]."); *Carey* v. *Greyhound Bus Co.*, 500

The imposition of liability upon unions as well as employers is necessary if the prophylactic and compensatory purposes of back pay awards, recently discussed by the Court in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), are to be served. As the Court noted in *Albemarle*,

> "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers *and unions* to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.' *United States* v. *N. L. Industries, Inc.*, 479 F.2d 354, 379 (CA 8 1973)." 422 U.S. at 417-18 (emphasis added).

In particular cases, there may be equitable considerations that should determine the apportionment of any back pay award under Section 706(g) of the Act[23] in favor of the employer or in favor of the union. There is a developing body of case law on the issue of what portion

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F.2d 1372, 1379 (5th Cir. 1974); *Myers* v. *Gilman Paper Corp.*, 393 F. Supp. 413, 421-22 (S.D. Ga. 1975), *appeal pending*, 5th Cir. No. 75-2201. But *cf. Thornton* v. *East Texas Motor Freight*, 497 F.2d 416, 424-26 (6th Cir. 1974).

[23] Section 706(g), 42 U.S.C. (Supp. V) § 2000e-5(g), provides:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. * * *"

of a back pay award should be paid by unions,[24] but the equitable considerations applicable under Section 706(g) come into play only after a determination of liability under Section 703(c). They are not at issue in this case, where trial on remedy has not yet been held. However, the acknowledgment in *Albemarle* of the practical importance of the *possibility* of back pay awards applies precisely to the liability issue discussed here.

As representative of the railroad industry in collective bargaining with national labor organiaztions, *amicus* is well aware that established seniority systems are a subject of great concern to labor. There is little to be gained by any employer in the perpetuation of a seniority system that is arguably discriminatory. Seniority systems are generally the creature of collective bargaining, instituted at union's insistence and altered only over their strenuous objections. Without the strong incentive of avoiding liability under Section 703(c)—and thus avoiding the possibility of back pay awards under Section 706(g)—unions would have little or no incentive to modify provisions they have long bargained for. And without that incentive, efforts to secure the Title VII rights of individual employees at the bargaining table would be frustrated.

The voluntary modification of seniority and other provisions of collective bargaining agreements is the most desirable method of granting relief to individuals who are the victims of discrimination in hiring. The alternatives are the further crowding of discrimination claims

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[24] *E.g., Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Carey* v. *Greyhound Bus Co.*, 500 F.2d 1372 (5th Cir. 1974); *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 48 L.Ed. 2d 823 (May 24, 1976); *Stevenson* v. *International Paper Co.*, 516 F.2d 103 (5th Cir. 1975); *Sabala* v. *Western Gillette, Inc.*, 516 F.2d 1251 (5th Cir. 1975), *petitions for writs of cert. pending*, Nos. 75-781 & 75-788; *Russell* v. *American Tobacco Co.*, 528 F.2d 357 (4th Cir. 1975), *cert. denied*, 48 L.Ed. 2d 176 (Apr. 19, 1976).

based on collective bargaining agreements into already overcrowded courts, or the accommodation of individual employees to the discrimination that Title VII is designed to eliminate. The policy favoring voluntary solutions to employment discrimination problems is embodied in the statute itself [25] and has often been remarked on in the lower courts. See *Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968): "[I]t is thus clear that there is great emphasis in Title VII on private settlement and the elimination of unfair practices without litigation." See also *Dent* v. *St. Louis-San Francisco Railway Co.*, 406 F.2d 399, 402 (5th Cir. 1969):

> "Thus it is quite apparent that the basic philosophy of these statutory provisions is that voluntary compliance is preferable to court action and that efforts should be made to resolve these employment rights by conciliation both before and after court action."

And in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court said:

> "Cooperation and voluntary compliance were selected as the preferred means for achieving [the elimination of employment discrimination]. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing State and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit." 415 U.S. at 44.

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[25] Section 706(b), 42 U.S.C. (Supp. V) § 2000e-5(b), provides that the Equal Employment Opportunity Commission, when it finds reasonable cause to believe that a charge filed with it is true, "shall endeavor to eliminate any * * * alleged unlawful employment practice by informal methods of conference, conciliation and persuasion."

Employers alone cannot modify offending seniority provisions without risking strikes and slowdowns, protracted litigation, and jeopardized relationships with the unions and employees. Thus, absent the incentive of avoiding backpay awards, unions reluctant to modify long-established seniority systems can seriously undermine the statutory policy of voluntary elimination of employment discrimination.

The policies of Title VII, recognized by this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), *Alexander* v. *Gardner-Denver*, *supra*, and in *Albemarle Paper Co.* v. *Moody*, *supra*, require that when an employer is held liable under Title VII because the seniority provisions in a collective bargaining agreement perpetuate the effects of prior discrimination, the unions which have signed and negotiated those provisions be held liable as well.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed insofar as it holds the union defendants liable under Title VII.

Respectfully submitted,

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